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No. 73-646

In the
Supreme Court of the United States

Supreme Court, U. S.
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JOHN L. KROWCZYK,
Petitioner,

vs.

UNITED STATES OF AMERICA.
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JOHN POWERS CROWLEY
53 West Jaskson Blvd.
Chicago, Illinois 60604
(312) 922-8980
Attorney For Petitioner

RICHARD T. SIKES
29 S. LaSalle Street
Chicago, Illinois 60603
(312) 263-6761
Of Counsel

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Petitioner, John L. Krowczyk, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit affirming a judgment of conviction entered by the United States District Court for the Northern District of Illinois.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported and is printed in the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on August 9, 1973. A timely Petition for Rehearing was

denied on September 19, 1973 (appendix). The jurisdiction of this court was invoked under 28 U.S.C. Section 1254(1).

ISSUES PRESENTED FOR REVIEW

1. Was the evidence sufficient in fact and in law to sustain the jury's verdict?

2. Are the statutes under which defendant was prosecuted constitutional?

STATEMENT OF THE CASE

Nature and Disposition

Defendant Krowczyk was subjected to an information (A. 1a)* which charged him with being an employer, who allegedly had collected federal income taxes withheld through wages, and then was given notice to collect said taxes and to deposit said collected taxes in a trust account for the United States, and who thereafter failed to collect certain withheld taxes and failed to deposit said taxes within a certain time in a bank account for the United States. in violation of certain United States law.

The defendant pled "not guilty" and the matter was tried to a jury which returned a verdict of guilty on July 26, 1972. Defendant's Motion for Judgment of Acquittal at close of all evidence was denied. Thereafter, on Sep-

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* "A" refers to Appendix; "TR." refers to Transcript of Trial; and "G.X." refers to Government Exhibit, all of which are filed in the United States Court of Appeals for the Seventh Circuit and transmitted to this court as a part of the record.

tember 12, 1972, defendant was sentenced to the custody of the Attorney General for one-year concurrently on each of twenty-one counts. (A. 3a).

The Trial

Former Revenue Agent Schunk testified that he conducted an investigation of defendant in 1968 for failure to pay taxes withheld from employees from 1965 and that following a conversation with defendant on August 7, 1968, he sent, on August 29, 1968, by certified mail, an L-54 Form (G.X. 1) to John L. Harris, Harris Company (G.X. 3 was stated to be a receipt for that letter by John L. Harris). In December, he delivered to defendant a form requiring defendant to collect taxes, establish a bank account, deposit taxes withheld or collected and keep the taxes for the Internal Revenue Service. (G.X. 2). On January 27, 1969 and January 29, 1969, he conversed with defendant concerning a supply of and completion of monthly returns. He stated that in March he transferred the case to the Intelligence Division because of non-compliance.

On the first day Schunk talked to defendant, he knew in general that there were possible criminal penalties attached to the matters about which he was investigating. His job was to collect delinquent taxes but he "never pursued that angle because I never got any payments." He did not have any discussion with defendant at the January meeting about collection or payment of tax.

Peter A. Cunningham, a criminal Internal Revenue Service investigator, testified that he obtained documents marked government group Exhibit 4 from the Federal Records Center and Exhibit 5, 6 and 7 and Group Ex-

hibit 10 from defendant. He prepared Exhibit 11 from documents supplied by defendant; it was a summary of taxes withheld by defendant. On June 3, 1969, defendant only had two small savings accounts in joint tenancy with his children. Government Exhibit 8 shows Certificate of Assessments against defendant and payments by defendant for the period in question.

It was stipulated that defendant was an employer of labor required to collect, account for, and pay over taxes withheld from wages.

ARGUMENT

I.

THE EVIDENCE WAS INSUFFICIENT AS A MATTER OF LAW AND FACT TO SUSTAIN THE GOVERNMENT'S INFORMATION.

Under Paragraph 2 of the Information and as specified in Title 26, Section 7512, United States Code, the Government alleged and was thereby and thereunder required to prove that "prior to October, 1968" defendant failed "to collect, truthfully account for, and pay over and to make deposits and payment of certain taxes withheld from wages."

The sole evidence of these alleged shortcomings of defendant is contained in the testimony of Revenue Agent Schunk. The nature of his investigation of defendant in 1968 was "concerning the failure to pay over to the United States Government the . . . taxes withheld from his employees." (TR. 13). Not one scintilla of evidence was offered that defendant failed to collect or truthfully account for said taxes. Yet, if defendant failed to collect the taxes prior to 1968, then he also failed to collect them after the stated notice of December 6, 1968 and the government's allegation of paragraph 4 that defendant "thereafter collected the taxes" must fail for want of proof and defendant should have been discharged.

Section 7215(a), Title 26, U.S.C., provides criminal penalties for failure to meet any provision of Section 7512(b), Title 26, United States Code.

Section 7512(b), Title 26, U.S.C., requires the designated person to do three things:

1) Collect certain taxes;

2) Deposit that amount of taxes; and

3) Retain such amount for payment to the United States.

The Government could have charged defendant with breaching one or more of the three requirements. *But,* the statutory scheme seems to recognize that a fulfillment of the first requirement is a *sine qua non* to being able to fulfill the second and third requirements. And the government recognized that principal in its charge, for it asserted that defendant "collected the taxes". Thus, the charge related only to the second and third requirements, and depended upon proof of compliance with the first requirement.

We suspect that defendant might have been charged initially with a breach of the failure to collect requirement, which incident was the predicate for the original notice whereby the requirements of Section 7512(b) became operative. But the governfent did not do that. Instead, it took defendant's simple failures to collect prior taxes and converted like subsequent incidents into actual collections (we too are befuddled by this contradictory position) and said unequivocally that defendant thereafter collected the taxes.

Thus, the government's position and proof are unequivocally contradictory and untenable.

To state our proposition in another way: The government can't charge a man with failing to collect a tax, place him on notice to collect and then prosecute him for doing exactly the same thing and merely say he collected

the tax. Either defendant collected the tax prior to and after December, 1968, in which case the government can't sustain its burden of proof for the predicate that he failed to collect (paragraph 2 of the Information) so as to allow a notice, or defendant did not collect the tax, in which case the government can't sustain its burden of proof for the charge he collected the taxes (paragraph 4 of the Information). See *United States* v. *Nitti*, 444 F.2d 1056 (7th Cir., 1971).

Our argument assumes, of course, sufficient evidence to sustain either factual position. We know little of what happened prior to December 6, 1968, except that the Internal Revenue Service made an investigation, gave a Notice to defendant on that date and thereafter defendant's assessment records show nothing in his credit reversal column.

II.

THE STATUTES UNDER WHICH DEFENDANT WAS CHARGED ARE UNCONSTITUTIONAL.

A. The Statutory Scheme in Question Violated Defendant's Right to Due Process Under the Fifth Amendment To The United States Constitution.

Title 26, Section 7512, United States Code, allows the making of an administrative decision to jeopardize an employer's freedom. No rights are given to a person thus jeopardized to show why he should not be treated differently than any other employer. In effect, then, that employer is denied due process of law under Amendment Five of the United States Constitution in that he is deprived of his liberty and property without the opportunity to be heard. "The extent to which procedural due process must be afforded the recipent is influenced by the extent to which he may be condemned to suffer

serious loss (citation) . . ." *Goldberg* v. *Kelly*, 397 U.S. 262-263 (1970) (deprivation of aid recipient's funds without administrative hearing). Thus, defendant's further status was jeopardized by an unilateral administrative decision without reason and without hearing. We believe the Fifth Amendment required more. And see *Boddie* v. *Connecticut*, 401 U.S. 371, 377 (1971) (denial of suit filing without payment of fee by indigents): "Early in our jurisprudence, this Court voiced the doctrine that (w)herever one is assailed in his person or his property, there he may defend, *Windsor* v. *McVeigh*, 93 U.S. 274-277, 23 L. Ed. 914 (1876)." *Stanley* v. *Illinois*, ... U.S. ....., 92 S.Ct. 1208 (1972) (denial of paternity without judicial hearing) and *Bell* v. *Burson*, 402 U.S. 535 (1971) (denial of driving privileges without administrative hearing.)

And so here defendant is affirmatively told to do something other than that required of other employers without a meaningful opportunity to be heard, and notwithstanding that the legislative scheme itself recognizes certain exceptions which could apply as equally well at the time of the notice as well as at the time of the later-required deposits, etc.

B. The Statutory Scheme in Question Constitutes Imprisonment For Mere Failure to Pay Money and Violates the Fifth Amendment to the United States Constitution.

Ultimately, this case reached the position that defendant's defense hinged upon his inability to pay, i.e., his inability to open a bank account with no money.

The government made no effort in this case to determine the wherewithal of defendant's funds during the crucial period following December 6, 1968. Rather, the whole

intent was to gather evidence to institute criminal prosecution. Schunk, the tax collector, testified he made no effort to collect any tax, either that withheld before December or that withheld after December (TR. 38, 45).

The testimony came from defendant, however, that he had only sufficient money to pay his employees their net income, could not open a bank account with no money, and was at times two or three weeks late in making payroll. (TR. 132-134, and even as to the inquiry the Court said it would "close it right now"). There was no evidence that defendant had funds available or that he squandered that which could have been available. In short, the entire government case is predicated on the proposition that if defendant doesn't pay he will go to jail; and moreover, even if defendant doesn't have the money but is willing to pay, defendant will still go to jail. And the notice given to defendant so stated:

Nowhere in the Internal Revenue Code is so harsh a position to be found. We submit that is nothing short of imprisonment for debt, contrary to the Fifth Amendment of the United States Constitution. No element of willfulness is to be found in the statute. In short, the defendant would go to jail for accidental, inadequate or negligent inability to have funds.

Defendant does not question that he owes money for taxes arising out of his employer status. We also agree that an employer ought not be in business unless he can meet his obligation (and bankruptcy has been provided for the unfortunates). But we know of no law, except that instant statutory scheme, that allows an employer to be imprisoned for failure to meet those obligations, short of a fraudulent scheme.

Consequently, the statute as so construed must fail as being constitutionally infirm. The exception to which we objected (TR. 158) mirrors that constitutional infirmity.

CONCLUSION

For the foregoing reasons, petitioner respectfully submits that a writ of certiorari should issue to review the judgment and opinon of the Seventh Circuit.

Respectfully submitted,

JOHN POWERS CROWLEY
53 W. Jackson Blvd.
Chicago, Illinois 60603
Attorney For Petitioners

RICHARD T. SIKES
29 S. LaSalle Street
Chicago, Illinois 60603
(312) 263-6761
Of Counsel

APPENDIX

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
August 9, 1973

Before
Hon LEONARD P. MOORE, Senior Circuit Judge[1]
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge

No. 72-1874

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

JOHN L. KROWCZYK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 72 CR 203
BERNARD M. DECKER, Judge.

ORDER

Defendant was the sole owner of the Harris Company, a painting and interior decoration firm in Chicago. In an information, he was charged with being an employer who failed to collect and pay to the United States income and social security taxes he had withheld from the wages of his employees. After a jury trial, he was convicted

[1] Senior Circuit Judge Lenoard P. Moore of the Second Circuit is sitting by designation.

of violating 26 U.S.C. §§ 7512 and 7215[2] and was sentenced to imprisonment for one year concurrently on each of 21 counts, resulting in this appeal.

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[2] 26 U.S.C. § 7512 provides in pertinent part:

"(b) Requirements.—Any person who is required to collect, account for, and pay over any tax imposed by subtitle C or by chapter 33, if notice has been delivered to such person in accordance with subsection (a), shall collect the taxes imposed by subtitle C or chapter 33 which become collectible after delivery of such notice, shall (not later than the end of the second banking day after any amount of such taxes is collected) deposit such amount in a separate account in a bank (as defined in section 581), and shall keep the amocnt of such taxes in such account until payment over to the United States. Any such account shall be designated as a special fund in trust for the United States, payable to the United States by such person as trustee."

26 U.S.C. § 7215 provides as follows:

"(a) Penalty.—Any person who fails to comply with any provision of section 7512(b) shall, in addition to any other penalties provided by law, be guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than one year, or both, together with the costs of prosecution.

"(b) Exceptions.—This section shall not apply—

"(1) to any person, if such person shows that there was reasonable doubt as to (A) whether the law required collection of tax, or (B) who was required by law to collect tax, and

"(2) to any person, if such person shows that the failure to comply with the provisions of section 7512(b) was due to circumstances beyond his control.

For purposes of paragraph (2), a lack of funds existing immediately after the payment of wages (whether or not created by the payment of such wages) shall not be considered to be circumstances beyond the control of a person."

The evidence showed that prior to August 1968 and through October 1969 defendant failed to pay the United States the federal income and social security taxes he had been withholding from his employees' pay checks. Defendant's excuse was that he did not have the money to pay the taxes. On August 7, 1968, Internal Revenue Service Agent Kenneth Schunk advised defendant that he was required to make current deposits of the taxes he was withholding from his employees. Additional warnings were given by Schunk later in August 1968, in December 1968,[3] and again in January 1969. Nevertheless, defendant did not comply, so that in March 1969 the case was transferred to the Intelligence Division of the Internal Revenue Service for criminal investigation.

On June 3, 1969, Peter Cunningham, a Special Agent of the Internal Revenue Service assigned to its Intelligence Division, interviewed defendant and told him that he had the right to remain silent, the right to counsel, and that anything he said could be used against him criminally. Defendant told Cunningham that a Mr. Holquist was the lawyer representing him in a pending divorce action and had represented him during defendant's prior difficulties with the Internal Revenue Service. Defendant told Cunningham that Holquist had his books and records. On the same day, Cunningham and another Special Agent, Thomas Curran, conferred with Holquist, who advised them that he had a blanket power of attorney to represent defendant.

Defendant admitted on cross-examination that several times prior to December 1968 he had failed to pay the Government the taxes withheld from his employees. He acknowledged his understanding of the statutory obligation imposed upon him by 26 U.S.C. § 7512. Although he continued to operate his business until the end of October

[3] At the December 6, 1968, interview, Schunk handed defendant a notice to pay, collect and deposit the withholding taxes as provided in 26 U.S.C. § 7512(a) (2).

1969, he did not open the required special trust fund bank account nor make any payment of these taxes to the Government. None of the taxes had been paid by defendant at the time of his July 1972 trial.

I

Defendant's conversations with Agents Schunk and Cunningham were properly admitted. As to his August 7, 1968, conversation with Revenue Agent Schunk, the warnings required by *Miranda* v. *Arizona*, 384 U.S. 436, were not necessary because this interview was conducted before March 1969, when the case was transferred to the Intelligence Division of the Internal Revenue Service for a criminal investigation. *United States* v. *Dickerson*, 413 F.2d 1111, 1116-1117 (7th Cir. 1969). Similarly, defendant's conversation with Special Agent Cunningham was admissible even though the *Miranda* warnings were not given, because the conversation occurred on June 3, 1969, and the *Dickerson* ruling was effective only after July 28, 1969. 413 F.2d at 1117. Moreover, as shown above, Cunningham had given the defendant three of the warnings required by *Miranda*. It was unnecessary to give the fourth *Miranda* warning.[4]

II

Government's Exhibits 5, 6 and 7[5] were not obtained in violation of the *Dickerson* rule.[6] These three documents

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[4] Thus Cunningham was not obliged to inform the defendant that if he could not afford an attorney one would be appointed for him, since the defendant had given his attorney's name to Cunningham. *Miranda* v. *Arizona*, 384 U.S. 436, 473 n. 43.

[5] Exhibit 5 was a schedule of defendant's employees showing their social security numbers, gross wages and taxes withheld from wages. Exhibit 6 consisted of photocopies of defendant's W-2 forms for his employees. Exhibit 7 was his profit and loss statement.

[6] Despite the Government's invitation to overrule *Dickerson*, we decline to do so.

were obtained by Special Agent Cunningham after the *Dickerson* decision. As noted, taxpayer had been given the essential *Miranda* warnings at the start of the first interview with Cunningham on June 3, 1969. *Dickerson* does not require that the warnings be subsequently repeated, so that these exhibits were properly admitted.

III

Government Exhibits 1, 3, 4, 10 and 11 were also properly admitted. Exhibit 1 was a form letter sent by certified mail notifying defendant of the consequences of failure to pay his taxes, and Exhibit 3 was a receipt therefor signed by "John L. Harris," defendant's business name. In view of the unrebutted presumption that the form letter was received by the addressee,[7] it was unnecessary for the Government to show that the receipt was actually signed by defendant. Agent Schunk's testimony that he had sent the form letter to defendant at his home and received the receipt was adequate foundation for the admission of the documents.

Defendant also objects to the admissibility of Government Exhibit 4, consisting of ten 941-M employer's monthly federal tax forms filed by defendant with the Internal Revenue Service and showing the following amounts: wages paid, income taxes withheld, social security taxes withheld, and taxes due the Government. These covered the period from January 1969 to October 1969, the period covered by the information. Cunningham testified that he had obtained them from the Federal Records Center. Defendant objected to a lack of proper foundation for the admission of these documents. However, Cunningham testified where they were obtained and that they bore the name and address of defendant's company. They were properly received as admissions of

[7] See, *e.g.*, *United States* v. *Wolfson*, 322 F.Supp. 798, 812-813 (D. Del. 1971), affirmed, 454 F.2d 60 (3d Cir. 1972), certiorari denied, 406 U.S. 924.

defendant, regardless of the accuracy of the tax computations thereon.

Government Exhibit 10 was a photocopy of defendant's payroll journal, and again the objection at trial was that no foundation was laid. However, Cunningham's testimony that he made a photocopy of defendant's payroll journal supplied an adequate foundation. The photocopy was admissible as a duplicate orginal. McCormick on Evidence, § 236, pp. 567-569 (2d ed. 1972); 4 Wigmore on Evidence, § 1234(2), pp. 551-556 (Chadbourn rev. ed. 1972).[8]

Defendant also argues that Government Exhibit 11, which was Cunningham's summary of defendant's payroll records and cancelled checks, should not have been admitted. Hearsay was the ground of objection below, but it is well established that summaries are admissible if, as here, cross-examination of the summarist is allowed and the original records are available. *McDaniel* v. *United States*, 343 F.2d 785, 789 (5th Cir. 1965), certiorari denied, 382 U.S. 886.

IV

The examination of witnesses was not unduly limited. Since one of the original defenses was that defendant's 1969 divorce action was a "circumstance beyond his control" within the exceptions to 26 U.S.C. § 7215 (see note 2, *supra*), the Government withdrew an earlier objection to evidence of the divorce proceedings and asked the court to allow defendant to reopen his case and present evidence thereon. However, defendant declined to do so, so that

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[8] See also *United States* v. *Knight*, 451 F.2d 275, 280 (5th Cir. 1971), certiorari denied *sub nom. Grubbs* v. *United States*, 405 U.S. 965, *Myrick* v. *United States*, 332 F.2d 279, 282 (5th Cir. 1963), certiorari denied *sub nom. Bergman* v. *United States*, 377 U.S. 952; 28 U.S.C. § 1732 (b); 26 U.S.C. § 7513(c); Rules 1001(4) and 1003 of Proposed Rules of Evidence for the United States Courts and Magistrates (1973.

any objection was waived with respect to such evidence. Consequently, we need not decide whether a divorce proceeding was a circumstance beyond taxpayer's control.

Defendant also attacks the district court's rulings sustaining objections to questions concerning the status of his bank accounts and the timeliness of the payment of wages to his employees. He contends that answers to those questions would have shown the insufficiency of his funds, providing him with a defense. However, Section 7215 specifically invalidates "lack of funds" as a defense (see note 2, *supra*), so that the district judge's reclings were correct.

Defendant next states that he should have been allowed to testify on direct whether he had a reasonable doubt as to his obligation to open the bank account and make deposits in accordance with 26 U.S.C. § 7512. The question put to him on direct was improper as leading and was not rephrased by defense counsel. In any event, he answered this question during cross-examination by admitting his liability.

Defendant urges that on cross-examination he should have been permitted to ask Cunningham whether the divorce proceedings were a circumstance beyond his control within the exceptions to 26 U.S.C. § 7215 (see note 2, *supra*). Such a defense should have been presented during defendant's case rather than during the Government's case, as the district court correctly ruled. Furthermore, Cunningham's opinion on the meaning of the statute was not germane. *See United States* v. *Lehman*, 468 F.2d 93, 106 (7th Cir. 1972), certiorari denied, 409 U.S. 967.

Defendant also submits that the trial court should have allowed him to ascertain whether his business records showed that he ever had his employees' gross wages in his possession. Since, as shown, the statute specifically provides that lack of funds after the payment of wages is not a defense, the court rightly curbed such cross examination.

Although the defendant claims that the trial judge improperly interjected himself into the cause, our reading of the portion of the transcript relied upon shows that the court was merely ruling that defense counsel's question was in an improper form, prompting the court to suggest to defense counsel how to phrase the question properly. No impropriety occurred.

V

In our view, the evidence was more than sufficient to sustain a conviction. All the requirements for violating the statute were established by stipulation, testimony of the defendant, testimony of Revenue Agent Schunk, and the exhibits. Since defendant admitted that he failed to open the special bank account and deposit the funds as commanded by Section 7512, his guilt was established.

VI

The statutes under which defendant was charged are constitutional. Defendant asserts that 26 U.S.C. § 7512 violates the due process clause of the Fifth Amendment by providing for an administrative decision to be made without an opportunity to be heard. In an opinion by Justice Brandeis, a similar argument was rejected in *Phillips* v. *Commissioner*, 283 U.S. 589, where it was pointed out that the United States has the right to collect its internal revenue by summary administrative proceedings if, as here, there is adequate opportunity for a judicial determination. Therefore, the instant statute survived an identical attack in *United States* v. *Plotkin*, 239 F.Supp. 129 (E.D. Wis. 1965), which we endorse.

Defendant also contends that the statutes are contrary to the Fifth Amendment because he was unable to pay the taxes and therefore is being imprisoned for debt. This argument was recently rejected in *United States* v. *Patterson*, 465 F.2d 360, 361 (9th Cir. 1972), certiorari denied, 409 U.S. 1038. The court there stated:

> "The argument that he is being imprisoned for debt is specious. Patterson's misdemeanor was using as his own the tax money he was required by law to withhold from his workmen's wages and to pay over to the government. Congress had adequate power to punish such conduct."

As the Government points out, to avoid criminal penalties defendant had the choice of going out of business or borrowing the necessary funds to pay his employees' wages and deposit the withholding taxes.

It is immaterial that the statutory scheme does not require willfulness, for taxpayers are protected by the following safeguards: Notice must be hand-delivered before a subsequent failure to comply renders one guilty of the misdemeanor. Section 7512(a) (2). Guilt does not attack if the taxpayer can show there was reasonable doubt whether the law required collection of the tax or who was required by law to collect the tax. Section 7215 (b) (1). The statute also does not apply to a taxpayer showing failure to comply was due to circumstances beyond his control. Section 7512(b) (2). Defendant has not shown why it was unreasonable for Congress in Section 7512(b) to negate the defense of a lack of funds. This reflected the commonsense view that an employer should not be continuing in business unless he can meet his obligations.

Judgment affirmed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois 60604

September 14, 1973

Before

Hon. LEONARD P. MOORE, SR. Circuit Judge*

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. WILBUR F. PELL, JR., Circuit Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 72-1874 *vs.*

JOHN L. KROWCZYK,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

(72 CR 303)

On consideration of the petition for rehearing filed in the above-entitled cause,

IT IS HEREBY ORDERED that the petition for rehearing in the above-entitled appeal be and the same is hereby denied.

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* Hon. Leonard P. Moore, Sr. Circuit Judge of the U.S. Court of Appeals for the Second Circuit is sitting by designation.